RECENT CASES

Administrative Law—Securities and Exchange Commission—Hearings on Voluntary Plans for Simplification under the Holding Company Act—The Securities and Exchange Commission instituted proceedings against petitioners pursuant to § 11 (b) (2) of the Public Utility Holding Company Act,[1] the hearing thereunder being limited to the issue of dissolution. Late in the proceedings, petitioners, pursuant to § 11 (e) of the Act,[2] submitted voluntary plans which purported to achieve the requirements of § 11 (b) (2) without dissolution of petitioners. After examining the plans thoroughly, the Commission denied a full hearing[3] on them prior to the entry of its order, on the ground that the plans failed to hold out any real promise of effectuating the provisions of the Act and that a full hearing on them would delay unnecessarily the consummation of the pending proceedings. The Commission then entered its § 11 (b) (2) order, directing dissolution of petitioners.[4] On petition for review, it was contended, *inter alia,* that the Commission erred in not granting a full hearing on the plans prior to entering its order.[5] *Held,* affirmed. The Commission may, in its discretion, defer full hearings on § 11 (e) plans until after the entry of § 11 (b) (2) orders.[6] The exercise of the Commission's discretion is guided by the statutory requirement of prompt action, and, to this end, voluntary plans are not necessarily to be given the effect of staying proceedings under § 11 (b) (2). *American Power & Light Co. v. Securities & Exchange Commission,* 67 Sup. Ct. 133 (1946).

The instant case raises the question of the interrelationship of the hearing requirements of §§ 11 (b) (2) and 11 (e). The Commission has the affirmative duty of requiring compliance with § 11 (b) (2) as soon as

1. 49 STAT. 803, 821 (1935), 15 U. S. C. § 79k (b) (2) (1940). This section directs the Commission, as soon as practicable after January 1, 1938, "To require by order, after notice and opportunity for hearing, that each registered holding company, . . ., shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company . . . does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding company system."

2. 49 STAT. 803, 822 (1935), 15 U. S. C. § 79k (e) (1940). This section provides that "In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate . . ., any registered holding company . . . may, at any time after January 1, 1936, submit a plan to the Commission . . . for the purpose of enabling such company . . . to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, . . ., necessary to effectuate the provisions of subsection (b), and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; . . ."

3. The term "full hearing" is used throughout to denote a hearing which is concerned both with the efficacy of the ultimate objective of a plan and with the details of attaining such objective.

4. 11 S. E. C. 1146 (1942).

5. The Commission's order was affirmed below, where petitioners raised the same objection. 141 F. (2d) 606 (C. C. A. 1st, 1944).

6. Mr. Justice Rutledge, concurring, held that it was incumbent upon the Commission to provide by rules and regulations for a hearing on the plans prior to the entry of the order, that the Commission failed so to provide, but that petitioners must be deemed to have waived their rights to such hearings by submitting their plans unseasonably. Instant case at 150.

practicable, by compulsion if necessary.[7] On the other hand, § 11 (e) was designed to permit companies to work out voluntary plans for compliance which would make unnecessary the entry of involuntary orders,[8] but Congress did not intend that voluntary plans should relieve the pressure on holding company management to achieve prompt compliance.[9] Therefore, with respect to the requirement of promptness, the denial of full hearings on voluntary plans seems proper where, as in the instant case, such plans are primarily dilatory.[10] However, sections 11 (b) (2) and 11 (e) are not mutually exclusive methods of achieving compliance with the Act.[11] Thus, where the ultimate objectives of a § 11 (b) (2) order and a § 11 (e) plan are the same, the plan simply implements the order.[12] But where, as in the instant case, the plan challenges the ultimate objective contemplated by the order, it becomes necessary to resolve the conflict prior to the entry of the order, if regard is to be had for the purpose of § 11 (e).[13] In this situation, a determination of what is necessary to effectuate the statutory provisions is common to hearings under both sections of the Act. It is therefore difficult to see how the § 11 (e) hearing requirement is violated where, during a § 11 (b) (2) proceeding, the Commission gives thorough consideration to a voluntary plan on the issue of its efficacy. If it be found that the plan will not achieve compliance, then the details thereof are rendered irrelevant and hearings on such details made unnecessary. To this extent, the denial of *full* hearings seems proper.[14] In effect, this was the procedure employed by the Commission in the instant case.[15] The foregoing considerations make obscure the basis for the concurring opinion's position that the Commission treated § 11 (e) as an alternative method for achieving compliance with the Act, which it was free to follow or disregard at its pleasure.[16] For the same reasons, it is not clear why the majority opinion suggests that full hearings on voluntary plans would be required prior to the entry of a § 11 (b) (2) order, where such plans are

7. A § 11 (b) (2) order makes operative the § 11 (c) time limitation within which compliance with the order must be achieved, and it empowers the Commission to apply to the courts to enforce compliance pursuant to § 11 (d). 49 STAT. 803, 821, 15 U. S. C. §§ 79 k (c), (d).

8. *See* SEN. REP. No. 621, 74th Cong., 1st Sess. (1935) 33.

9. *Id.* at 58-60.

10. It was well established that the plans in the instant case were submitted for the strategic purpose of delaying the order. 11 S. E. C. 1146, 1216 (1945). *See* SEVENTH ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION (1942) 72-73.

11. *See* Northern States Power Company, S. E. C. (1947). HOLDING COMPANY ACT Release No. 7148.

12. In such a case, a full hearing on the details of the plan is assured either before or after the entry of the order. *See* instant case at 149; Commonwealth and Southern Corporation v. Securities and Exchange Commission, 134 F. (2d) 747, 754 (C. C. A. 3rd, 1942); Securities and Exchange Commission brief, instant case, pp. 110-114, 120-123.

13. *Cf.* Ashbacker Radio Corporation v. Federal Communications Commission, 326 U. S. 327, 329-330 (1945).

14. It should be noted that the hearing required under § 11 (e) is concerned with whether the plan is (a) necessary to effectuate the provisions of the statute and (b) fair and equitable to those affected. See note 2 *supra*. The former issue goes to the ultimate objective to be attained and may be determined quite apart from the latter issue, which involves complex details. See Commonwealth and Southern Corporation v. Securities and Exchange Commission, 134 F. (2d) 747, 754 (C. C. A. 3rd, 1942).

15. *See* instant case at 149; 11 S. E. C. 1146, 1216-1223 (1942).

16. *See* instant case at 151.

prima facie meritorious.[17] Rather, it would seem that the hearing requirements of both sections are integrated and satisfied by the Commission's procedure in the instant case.[18]

Bankruptcy—Interest on Defaulted Bond Interest Does Not Accrue in Bankruptcy—Bonds secured by a first mortgage, containing a covenant that interest be paid on overdue principal or overdue installments of interest, were issued by Inland Gas Corporation in 1928.[1] The indenture was executed in New York, by a Delaware corporation, whose principal place of business and assets were in Kentucky. As a result of action instituted by another utility for the purpose of stifling competition an equity receiver was appointed for Inland Gas in 1930,[2] the officers enjoined from paying its debts, and the equity court did not direct the payment of the bond coupons due February 1, 1931. Thereupon, the indenture trustee filed a bill of foreclosure. Later a reorganization action was duly transformed into a Chapter X proceedings. The present controversy is whether the first mortgage bondholder's claim in the distribution properly includes the covenanted amount of the interest on overdue interest, the mortgaged assets being of sufficient value to cover the claim.[3] The District Court upheld the claim of the bondholders. The Circuit Court reversed on a conflict of laws point.[4] On *certiorari, held,* in determining claims allowable and the distribution of assets, a bankruptcy court is not bound by state law but must administer bankruptcy laws in accordance with equitable principles. A legal suspension of the obligation to pay interest is adequate reason why no added compensation or penalty is to be enforced for failure to pay interest. To do otherwise would enrich the first mortgage bondholders and cause subordinate creditors to suffer a

17. *Id.* at 149. It might be desirable, for instance, to set in motion the affirmative consequences of a § 11 (b) (2) order prior to the completion of full hearings on voluntary plans. See note 7 *supra.* See also Northern States Power Company, S. E. C. (1947), HOLDING COMPANY ACT Release No. 7148.

18. *Cf.* Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134 (1940).

1. Covenants of this nature appear to be relatively common in mortgage trust indentures. Out of 57 indentures selected at random from the files of the Securities and Exchange Commission's list of indentures qualified under the Trust Indenture Act of 1939, 53 STAT. 1149, 15 U. S. C. § 77 aaa (1940), 49 contained covenants for interest on overdue installments of interest. Brief for the Securities and Exchange Commission, p. 7 n., Nos. 42, 43, 44, 45, Supreme Court, October Term, 1946.

2. Columbia Gas and Electric Corporation v. United States, 151 F. (2d) 461 (C. C. A. 6th, 1945), *cert. denied,* 67 Sup. Ct. 48 (1946). The court found that Columbia Gas had purchased approximately 36% of the bonds and 76% of the oustanding stock in order to be in a position to take advantage of the insecure financial position of Inland Gas Corporation, which was threatening Columbia with serious competition. The holders of 25% of the bonds outstanding might request the trustee of the Inland Trust Indenture to institute foreclosure proceedings upon default. As a result of the finding that receivership was instituted by Columbia Gas as a device to stifle competition, the court in this case ordered Columbia's claims on bonds and stocks to be subordinated to the claims of other creditors of every class.

3. Petition for Rehearing Nos. 42, 43, Sup. Ct., October Term, 1946, cites figures upon which this estimate was made. It was contingent upon the rejection of the appeal in Columbia Gas and Electric Corp. v. United States, 151 F. (2d) 461 (C. C. A. 6th, 1945) cited *supra* note 2. *Certiorari* was denied in that case, 67 Sup. Ct. 48 (1946).

4. Green v. Vanston Bondholders Protective Committee, 151 F. (2d) 470 (C. C. A. 6th, 1945). The District Court did not write an opinion.

corresponding loss. *Vanston Bondholders Protective Committee v. Green,* 67 Sup. Ct. 237 (1946).[5]

This case is somewhat uncommon, not alone because the majority of the Court relied upon cases which offer a very uncertain foundation for its theory,[6] but also because the point upon which it was decided was not argued by counsel for the bondholders or the Securities and Exchange Commission.[7] Relying first upon cases involving interest in tax disputes,[8] a question hardly comparable to the interest contract of a trust indenture, the majority purported to find therein a principle indicating when and under what circumstances federal law will allow interest. Other cases were cited where the creditor was deneid interest when the security amounted to less than the principal and interest claimed,[9] though in one of these the creditor had delayed the sale of the assets in the hope of obtaining a larger return thereby.[10] This rule of denying interest where the secured assets will not cover principal and interest seems well established, but the same rule does not apply where the security is sufficient to pay both;[11] the situation in the present case. The Court cites the *Ticonic National Bank* case [12] as a holding that the right of bondholders to share in unmortgaged assets is limited to their sharing ratably with unsecured creditors; but since mortgaged assets are involved in the present dispute, that portion of the *Ticonic National Bank* opinion which seems directly applicable is to the effect that even a non-interest bearing lien entitles its holder to interest for any period subsequent to bankruptcy when the assets on which he has a lien are sufficient to cover principal and interest.[13] Are we now to understand that the Bankruptcy Act sanctions disturbing this inequality (at least as to interest on overdue interest covenants) which has been bargained for by the debtor and creditor and is a matter of record,[14] and if so is this another straw in the wind moving toward modification of the priority rule? [15] Turning, to the economic phase of the case,

5. *Cert. denied,* 15 U. S. L. WEEK 3266.

6. Justice Frankfurter and two other members of the court joined in a concurring opinion based on the conflict of laws point of the appeal.

7. Examination of the briefs discloses no such contention, and letter from counsel stated that the point was not argued orally. The S. E. C. joined with the Vanston Bondholders Committee in the appeal under Section 208, Bankruptcy Act, 52 STAT. 894 (1938), 11 U. S. C. § 608 (1940).

8. Board of Commissioners of Jackson County v. United States, 308 U. S. 343 (1939); Royal Indemnity Company v. United States, 313 U. S. 289 (1941).

9. Thomas v. Western Car Co., 149 U. S. 95 (1893).

10. Sexton v. Dreyfuss, 219 U. S. 339 (1911).

11. Coder v. Arts, 213 U. S. 223 (1909) and Group of Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 318 U. S. 523 (1943) held that under Section 77B of the Bankruptcy Act interest on secured claims accruing to the date of the plan had the same priority as principal.

12. Ticonic National Bank v. Sprague, 303 U. S. 406 (1938).

13. In reaching this conclusion the Court had said: "But to the extent that a debt is secured and another is not there is manifestly an inequality of rights between secured and unsecured creditors, which can not be affected by the principle of equality of distribution . . . and interest accruing after insolvency may not be withheld on account of that principle." *Id.* at 412. *Accord:* Chemical National Bank v. Armstrong, 59 Fed. 372 (C. C. A. 6th, 1893).

14. Case v. Los Angeles Lumber Products Company, 308 U. S. 106 (1939). In this case, although more than 80% of the bondholders agreed to the plan of reorganization, the court condemned it as not fair and equitable because the bondholders had not been given an absolute priority in the assets.

15. Otis v. Securities and Exchange Commission, 323 U. S. 624 (1945). The court found a plan fair and equitable which allowed the common stockholders to participate in the distribution of the assets before preferred stockholders received the value of their full liquidation preference. This on the grounds that Congress did not intend

the court thought that allowing interest on the coupons dating back to 1931 would "enrich" the holders and would not be justified on equitable principles.[16] However, although the federal government has been committed to a low interest rate policy for many years, the prevailing concept of interest in capitalistic society, reached by different theoretical approaches, is still a payment for something productive, something used for profit and advantage.[17] In this case the interest funds withheld from bondholders were available, for at least a part of the period, to the bankrupt estate and used for the benefit of that estate. Since it appears that the affairs of the company improved during the years of bankruptcy,[18] the benefit seems to have accrued to the estate. Is it equitable thus to allow the debtor estate to profit by this delay beyond the day of settlement?[19] Had the bondholders received their interest when due, reinvestment or the pleasure of consumption would have brought them the equivalent of what they now claim. While bondholders have traditionally been linked with wealth, the serious financial repercussions of this type of situation to institutional investors and persons of limited means can not be doubted. Furthermore, here the court is considering the equities between creditors, and creditors and debtor, not the question of lower fuel rates which might be brought about by reduced interest costs, where public policy might weigh heavily in determining equities. If this decision is to stand, with interest on interest covenants barred in bankruptcy, bondholders will have an inducement to seek recovery through other avenues of protection—demand for sale, operation of the properties, and the like. Will this be to the benefit of the debtor or subsequent creditor?

Bankruptcy—Preference—Perfection of Assignment of Accounts Receivable under Restatement Rule—A New Jersey retailer assigned forty-four accounts receivable as security for advances concurrently made. The assignee did not notify the debtors of the assignments until five days before the assignor was thrown into bankruptcy. The court assumed that New Jersey law governing priority of successive assignments provided that a first assignee did not have to notify the debtor to be protected; but if a subsequent bona fide assignee collected from the debtor, he could retain the proceeds.[1] *Held,* the potential interest of a possible second assignee

that the exercise of its power over holding company systems should mature rights created without regard to the possibility of the exercise of that power and which otherwise would mature only by the voluntary act of stockholders or involuntarily by their creditors.

16. United States v. Childs, 266 U. S. 304 (1924). The court distinguished between interest as a form of compensation, and a penalty as a form of punishment.

17. While many theories purport to explain interest, a modern concept which has received much approval is that of J. M. Keynes, to the effect that interest is a reward paid to induce savers to give up their liquidity preference for a specified period. KEYNES, GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (1936) p. 167.

18. Petition for Rehearing, cited *supra* note 3.

19. Sexton v. Dreyfuss, 219 U. S. 339, 346, cited *supra* note 10. Interest and dividends accumulating on securities on which creditors had a lien were ordered paid to the creditors on the ground that it was not equitable thus to permit the debtor or subsequent creditors to profit by delay in settling the estate.

1. The court was doubtful whether New Jersey followed the Restatement rule or the New York rule on assignments of accounts receivable. It assumed the position most favorable to the trustee in bankruptcy and decided the case on the basis of the Restatement rule. Compare Moorestown Trust Co. v. Buzby, 109 N. J. Eq. 409, 157 Atl. 663 (1932) with Executors of Luse v. Parke, 17 N. J. Eq. 415 (1864) and Emley v. Perrine, 58 N. J. L. 472, 33 Atl. 951 (1896).

was not such as would enable the trustee to claim that the assignment was a voidable preference under § 60 (a) of the Bankruptcy Act.[2] *In re Rosen*, 157 F. (2d) 997 (C. C. A. 3rd, 1946).

The effect of this case, if its rule stands, will be to limit attacks on accounts receivable financing to those cases in which the assignee's interest can be defeated only by subsequent events within his own control.[3] Section 60 (a) defines a preference as a transfer made for an antecedent debt within four months prior to bankruptcy and provides that a transfer shall be deemed to have been made when no bona fide purchaser could thereafter acquire any rights in the property transferred superior to those of the transferee. The Supreme Court in the *Klauder* case [4] held that in states adhering to the rule of *Dearle v. Hall*,[5] *i. e.* as between successive assignees the first to notify the debtor prevails, assignments were not perfected until the assignee had given notice. Since under the New York rule the first assignee is protected whether he gives notice or not,[6] the assignment would be perfected when made. The rule thought to obtain in New Jersey, which is that adopted by the Restatement,[7] is really a modification of the New York rule, extending the protection everywhere given to a bona fide paying debtor to a second assignee collecting in good faith. This court concluded that the rights accorded to a subsequent assignee in New Jersey are not due to his status as a bona fide purchaser, but spring from his activities following the assignment.[8] But in the *Klauder* case the effect of a subsequent assignee's action, *i. e.* notification, was the basis for deciding that the assignment was not perfected. However, there is a valid distinction in the type of action required under the state law in each case—in the *Klauder* case, notification could be controlled by the first assignee; in the instant case collection is within control of the paying debtor.[9] The decision in the instant case can also be supported on the ground that a second assignee in New Jersey acquires no superior right in the "property transferred"—as required by § 60 (a)—but that his right in the *proceeds* of such property is protected after that property has ceased to exist by reason of his collection of the debt.[10] Moreover, under the New

2. 52 STAT. 840 (1938), 11 U. S. C. § 96 (1940).

3. McLaughlin, *Defining a Preference in Bankruptcy* (1946) 60 HARV L. REV. 233, 249-250.

4. Corn Exchange National Bank and Trust Co. v. Klauder, 318 U. S. 434 (1943), (1943) 91 U. OF PA. L. REV. 666.

5. 3 Russ. 1, 38 Eng. Rep. 475 (1828). Pennsylvania originally was in accord. Phillips' Estate (No. 3), 205 Pa. 515, 55 Atl. 213 (1903). But the rule has subsequently been changed. Act of July 31, 1941, P. L. 606, § 1, PA. STAT. ANN. (Purdon, Supp. 1945) tit. 69, § 561.

6. McKenzie v. Irving Trust Co., 266 App. Div. 579, 44 N. Y. S. (2d) 264 (1st Dep't 1944), *aff'd. on different grounds*, 292 N. Y. 347, 55 N. E. (2d) 192 (1944) and 323 U. S. 365 (1945); State Factors Corp. v. Sales Factors Corp., 257 App. Div. 101, 12 N. Y. S. (2d) 12 (1st Dep't 1939).

7. RESTATEMENT, CONTRACTS (1932) § 173. In addition to protecting a second assignee who has collected from the debtor, the Restatement Rule also protects him when he (1) obtains a judgment against the debtor; (2) secures a novation; (3) obtains an instrument which embodies the debt. *Accord*, Rabinowitz v. People's National Bank, 235 Mass. 102, 126 N. E. 289 (1920) (but Massachusetts has since adopted the New York rule, MASS. LAWS ANN. tit. 3, ch. 107A, § 1 (Recomp. Vol., 1947)); *see also* Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 199, n. 7.

8. Instant case at 1001.

9. McLaughlin, *supra* note 3.

10. *See* Koessler, *Assignment of Accounts Receivable* (1945) 33 CAL. L. REV. 40, 85. *Contra: In re* Vardaman Shoe Co., 52 F. Supp. 562 (E. D. Mo., 1943).

Jersey or Restatement rule, it is doubtful if notice by a first assignee to the debtor, before a second assignee collects in good faith, would be sufficient to defeat the protection given the bona fide second assignee;[11] this being the case the assignment could never be perfected as long as the debt remained uncollected, and the assignee seeking to enforce his lien in bankruptcy would always fail.[12] The decision reached by this court circumvents this possibility by giving to the Restatement rule the same consequences in bankruptcy as the New York rule and is in line with the policy of recent state legislation validating the position of the first assignee in non-notification financing of accounts receivable.[13]

Corporations—Powers and Liabilities—Criminal Responsibility for Act of Agent—Defendant corporation, whose salesman induced a customer to execute a false certification of necessity in violation of a War Production Board Order,[1] was indicted for the violation. On appeal from conviction in the trial court *held,* reversed, because it was shown that the agent's act was unknown to anyone else in the corporation and was committed in direct disobedience to instructions. *Holland Furnace Co. v. United States,* 158 F. (2d) 2 (C. C. A. 6th, 1946).

Although an early English court held that corporations are not indictable[2] the criminal laws have been progressively extended so that corporations have been convicted for a wide variety of crimes, including those which require personal intent as an essential ingredient.[3] It is not, however, clearly settled whether a corporation may be indicted for a crime committed by its agent within the scope of his authority but without the

11. No cases were discovered involving this exact point; this may be due to the fact that such situation would require the concurring dishonesty of both the assignor and debtor—a rare possibility. However, § 173 of the Restatement is very explicit in protecting the first assignee in all except the specifically excepted situations mentioned in note 7 *supra. See* AM. LAW INST., COMMENTARIES ON RESTATEMENT (Contracts No. 15-R., 1926) 33, 34.

12. To allow notice by the first assignee to operate as a perfection of the assignment for bankruptcy purposes where the assignment is made in states having the Restatement rule would be contrary to the holding of the *Klauder* case that state law is controlling for this purpose.

13. *See* Koessler, *New Legislation Affecting Non-Notification Financing of Accounts Receivable* (1946) 44 MICH. L. REV. 563.

1. WPB Limitation Order L-79 § 3288.31, 10 FED. REG. 8556 (1945): "No seller may deliver an item on list A to fill a consumer's unrated order unless he obtains a certification. . . No one may deliver relying on the certification being true if he knows or should know that it is false. . . . Any person who wilfully violates any provision of this order or who, in connection with the order, willfully conceals a material fact or furnishes false information to any department or agency of the United States is guilty of a crime and upon conviction thereof may be punished by fine or imprisonment, or both."

2. Sutton's Case, 12 Mod. 559 [K. B., 1701].

3. United States v. New York Herald Co., 159 Fed. 296 (S. D. N. Y., 1907) (knowingly depositing obscene matter in the mails); Golden Guernsey Farms v. State, 63 N. E. (2d) 699 (Ind., 1945) (selling adulterated food with intent to defraud); Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N. E. 445 (1899) (criminal contempt); State v. Lehigh Valley R. R. Co., 90 N. J. L. 372, 103 Atl. 685 (1917), *aff'd.,* 94 N. J. L. 171, 111 Atl. 257 (1920) (manslaughter); People v. Canadian Fur Trapper's Corp., 248 N. Y. 159, 161 N. E. 455 (1928) (larceny). *But see* BALLANTINE, CORPORATIONS (1927) § 94; Francis, *Criminal Responsibility of the Corporation* (1924) 18 ILL. L. REV. 305; Canfield, *Corporate Responsibility for Crime* (1914) 14 COL. L. REV. 469.

knowledge of the corporation or against its instructions.[4] There are relatively recent cases which, while not square holdings on the issue, indicate that knowledge by the corporation is necessary to sustain conviction.[5] The court here relies heavily on *John Gund Brewing Co. v. United States*[6] in which it was held that the disobedience of the agent was competent evidence for the corporation's defense, and attempts to distinguish cases which have reached contrary conclusions. The grounds for distinction, however, appear to be somewhat doubtful. *United States v. Ill. Cent. R. R. Co.*,[7] for example, involved the violation of a law which prohibited the confining of cattle in cars for longer than a specified period. The instant court contended that the negligence of the yardmaster was properly imputed to the corporation because the law there had imposed a non-delegable duty. It is difficult to see how the duty imposed in the instant case is any the less non-delegable. *C. I. T. v. United States*[8] is distinguished in that the offending agent there was a branch manager. But the court in that decision carefully stated that it considered the position of the agent in the corporate hierarchy immaterial to the issue of criminal responsibility. *New York Central R. R. Co. v. United States*[9] is distinguished on the ground that the violated law expressly made the act of the agent that of the corporation. But the Supreme Court considered such an express provision unnecessary in imputing the crime to the corporation in *Dotterweich v. United States*,[10] where that point was raised. Further, the court ignores a recent circuit court decision and several state court decisions all of which are *contra* to the instant decision.[11] Also unnoted are recent English decisions which indicate that lack of knowledge by the corporation is not decisive on the question of liability.[12]

Apart from the matter of legal precedent, the court's analysis of the problem is questionable. It is submitted that no general rule should be developed from the cases involving this problem, but rather that the decision should rest on the reasonable interpretation of the statute violated. In the instant case the prohibited act, by its very nature, would in many (perhaps most) instances be done by a corporate agent and to exonerate

4. "Moreover, a corporation may be liable to a penalty for an act of an agent if done in the course of his employment though contrary to instructions." 10 FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS (perm. ed., 1931) § 4949. "The fact that a corporation's agent exceeds his authority or acts without the knowledge or sanction of his principal is a matter of defense." 7 THOMPSON, LAW OF CORPORATIONS (3d ed., 1927) § 5645. "A principal will not ordinarily be held liable for the crimes of his agent unless he in some way directed or participated in, or approved the act." MECHEM, OUTLINES OF THE LAW OF AGENCY (3d ed., 1923) § 562.

5. Old Monastary Co. v. United States, 147 F. (2d) 905 (C. C. A. 4th, 1945); United States v. Wilson, 59 F. (2d) 97 (W. D. Wash., 1932); *cf.* Mininsohn v. United States, 101 F. (2d) 477 (C. C. A. 3d, 1939); United States v. Brunett, 53 F. (2d) 219 (W. D. Mo., 1931).

6. 204 Fed. 7 (C. C. A. 8th, 1913).

7. 303 U. S. 239 (1938).

8. 150 F. (2d) 85 (C. C. A. 9th, 1945).

9. 212 U. S. 481 (1909).

10. 320 U. S. 277 (1943).

11. Zito v. United States, 64 F. (2d) 772 (C. C. A. 7th, 1933); State Bank of Waterloo v. Potosi Tie & Lumber Co., 299 Ill. App. 524, 20 N. E. (2d) 893 (1939); Vulcan Last Co. v. State, 194 Wis. 636, 217 N. W. 412 (1928); *cf.* United States v. Dotterweich, 320 U. S. 277 (1943); Ripka v. Philco Corp., 65 F. Supp. 21 (S. D. N. Y., 1945), *aff'd.*, 154 F. (2d) 501 (C. C. A. 2d, 1946); Pratt v. Duck, 191 S. W. (2d) 562 (Tenn. Ct. App., 1945); TWA v. Bank of America, 116 P. (2d) 791 (Cal., 1941).

12. Mousell Bros., Ltd. v. London & N. W. Ry. Co. [1917] 2 K. B. 836; *cf.* Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd. [1944] K. B. 146; Griffiths v. Studebakers, Ltd. [1924] 1 K. B. 102.

the corporation would, therefore, effectively circumvent the purpose of the law. This test of liability has been adopted in England [13] and was endorsed in the *C. I. T.* case.[14] Its use in this case would have been highly desirable.

Criminal Law—Polygamy—Application of Mann Act to Mormons—Defendants in a prosecution for violation of the White Slave Traffic Act [1] are members of a Mormon sect which still practices polygamy.[2] Each defendant had transported at least one plural wife across state lines either for the purpose of cohabiting with her or for the purpose of aiding another member of the cult in such a practice. The Act makes an offense the transportation in interstate commerce of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." The defendants were convicted. On certiorari, *held,* (three judges dissenting) [3] such transportation across state lines was for an "immoral purpose" within the meaning of the Act. Although the Act was aimed primarily at the use of interstate commerce for the conduct of the white slave business, its application is not restricted to commercialized vice, since debauchery [4] means indulgence motivated solely by lust. *Cleveland v. United States,* 67 Sup. Ct. 13 (1946).

The Mann Act is universally recognized as a foremost example of the application of the rule of statutory construction which holds that if the language of a statute is plain, the courts will not consider the intent of the legislature.[5] A recent decision of the Supreme Court had seemingly

13. This test grew out of the Interpretation Act, 1889, 52 & 53 VICT. c. 63, § 2, which provides that "In the construction of every enactment relating to an offense punishable by indictment . . . the word 'person' shall, unless contrary intention appears, include a body corporate." In ascertaining whether or not a "contrary intention" appears, the English courts have come to inquire what the statute in question was designed to accomplish and whether or not the conviction of the corporation would best accomplish this purpose. This analysis is well illustrated in Director of Public Prosecutions v. Kent & Essex Contractors, Ltd. [1944] K. B. 146 and in Mousell Bros., Ltd. v. London & N. W. Ry. Co. [1917] 2 K. B. 836. The test was well summed up in the latter case (at 846): "When a penalty is imposed for the breach of a duty, it is reasonable to infer that the penalty is imposed for the default of a person by whom the duty would ordinarily be performed."

14. The court there decided that the law violated (falsification of credit certificates turned over to the United States Government) was violated by the person "by whom the duty would ordinarily be performed" and that if the corporation were not held liable the purpose of the law . . . deterring the submission of false certificates to the Government by credit agencies . . . would be rendered futile.

1. 36 STAT. 825 (1910) 18 U. S. C. § 398 (1940).

2. The Church of Jesus Christ of Latter-Day Saints has forbidden plural marriages since 1890. See Toncray v. Budge, 14 Idaho 621, 95 Pac. 26 (1908).

3. Mr. Justice Douglas delivered the majority opinion. Justices Black, Jackson, and Murphy dissented, with Justice Murphy writing the dissenting opinion.

4. "'Debauchery,' contemplated within the act, evidently includes corruption of sexual moral principles. In its common meaning, to 'debauch' is to lead astray morally into dishonest and vicious practices; to corrupt; to lead into unchastity. 'Debauchery' is ordinarily thought of as an excessive indulgence of the body; licentiousness; the taking up of vicious habits. As used in the statute, it connotes sexual immorality and that character of life which will lead eventually to sexual immorality." United States v. Long, 16 F. Supp. 231, 232 (E. D. Ill., 1936).

5. See Caminetti v. United States, 242 U. S. 470 (1917); Booth, *The White Slave Traffic Act* (1945) CALIF. S. B. J. 102; (1944) 33 GEO. L. J. 114, 118. There seems little doubt that the sole intent of the legislative framers was to prevent the procuring and shipping of prostitutes in interstate commerce by professional panderers. H. R. REP. No. 47, 61st Cong., 2d Sess. (1910) 10; SEN. REP. No. 886, 61st Cong., 2d Sess. (1910); 45 CONG. REC. 805, 821, 1035, 1037 (1910); instant case at 20.

indicated that the trend was to limit the application of the Act to commercialized or compulsory prostitution in conformity with the original Congressional intention [6] and thus overcome the objectionable results of the literal interpretation.[7] The instant case, however, would seem to show that the majority of the Court is not yet willing to overthrow the ruling of the *Caminetti* case,[8] which extended the application of the Act beyond the field of commercialized vice—not, at least, when there is an opportunity to strike another telling blow at polygamy. It is not surprising that the Court should hold that polygamous practices are in the same genus as the other immoral acts covered by the statute [9] in view of the far from sympathetic manner in which the celebrated "Mormon cases" were treated.[10] Arguments in defense of polygamy based on religious conviction have been foreclosed since *Reynolds v. United States*.[11] The law looks upon the plural "marriage" as completely inexcusable and the children of such a union are treated as illegitimates.[12] It must be remembered that religion is the very bloodstream of our legal system,[13] and common law has always treated polygamy as an offense against society.[14] Religious motivation being immaterial, there seems to be less justification for the defendant in the instant case than for the individual who transports his single concubine across a state line. Thus, the Court has by its decision reaffirmed the sweeping construction of the Mann Act and placed another obstacle in the path of the polygamist.

Labor—Refusal to Handle Goods—Conspiracy in Restraint of Trade—Appellants are members of a labor union which had organized all the non-supervisory employees of all the milk processing plants in the Kansas City area. They then attempted to bring all the rural milk haulers [1] into the union and had induced forty-two out of the fifty-five in

6. Mortensen v. United States, 322 U. S. 369 (1944) (interstate transportation of prostitutes on a purely vacation trip does not come under Mann Act); see Note (1945) 39 ILL. L. REV. 293.

7. It has been pointed out that the law opens wide the door for blackmailers and imposes restrictions on the individual which the states have never enforced. Rogers, *The Mann Act and Noncommercial Vice* (1933) 37 LAW NOTES 107; Davids, *Application of Mann Act to Noncommercial Vice* (1916) 20 LAW NOTES 144. The Department of Justice has adopted a policy of studied neglect in applying the Act to the private trips of paramours—a discretionary attitude which is dangerous in itself as tending towards unequal enforcement of the criminal law. Booth, *supra* note 5 at 102, 103.

8. Caminetti v. United States, 242 U. S. 470 (1917) (defendant who traveled across a state line with a woman whom he intended to make his mistress held to be within the Act).

9. Instant case at 16.

10. *E. g.*, in Davis v. Beason, 133 U. S. 333, 343 (1889) the Court said, "They (bigamy and polygamy) tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade women, to disease men. Few crimes are more pernicious —." *See also* Mormon Church v. United States, 136 U. S. 1, 49, 50 (1889); Reynolds v. United States, 98 U. S. 145, 164 (1878).

11. 98 U. S. 145 (1878).

12. Under the common law in force in the territory of Utah by virtue of the Organic Act, a child born as the result of a plural marriage is illegitimate, unless legitimated by statute. Mansfield v. Neff, 43 Utah 258, 134 Pac. 1160 (1913).

13. Manion, *Religion and American Law* (1942) 22 B. U. L. REV. 261.

14. Instant case at 15.

1. The function of the haulers was to transport the milk from the dairy farmers to the processing plants. In this group there were both contract haulers and hired truckers.

the area to join. In pursuance of their plan [2] they refused to unload the milk delivered by the respondent because he was not a union member. An injunction was granted [3] against the appellants for having violated a statute [4] which prohibited conspiracies in restraint of trade. On appeal, *held,* cause affirmed and remanded for redrafting of decree.[5] *Rogers v. Poteet,* C. C. H. Trade Reg. Serv. (9th ed.) ¶ 57, 499 (Mo. Sup. Ct. 1946).

The decision in this case gives rise to some interesting speculation. It is to be noted that the only act complained of was appellant's refusal to unload respondent's milk. But there is much authority to the effect that union members have a privilege to refrain from working with non-union handled materials.[6] In fact, a Kansas statute which attempted to extinguish this privilege was declared to be unconstitutional.[7] It is true many cases deny the privilege, but a close analysis will disclose that other elements were present such as malice, threats, coercion, violence, and retaliation.[8] But the court found that these were not present here.[9] We

2. The union decided not to receive or unload milk from the non-union drivers. But, not to inconvenience the public, they decided to stop only two drivers initially. The effect was to keep all the haulers guessing as to which two would have their milk rejected.

3. A decree of the circuit court of Jackson County, dated May 2, 1945, perpetually enjoined them "and all persons claiming under or acting under the direction or authority of them, or any of them, from hindering, interfering with, preventing or endeavoring to prevent, interfere with or hinder in any respect whatever, the receipt, unloading and processing of any milk carried in any truck operated or caused to be operated by the plaintiff, the said Steve Rogers, his agents, employees or representative, to the said Borden Dairy Company, in Kansas City, Missouri."

4. 2 Mo. Rev. Stat. (1939) c. 43, § 8301, "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in the state, or thing bought or sold whatever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided for in this article." Note that the Missouri law remains the same as the Federal Sherman Anti-Trust Act was before the passage of the Clayton Act, the Norris-LaGuardia Act, and the National Labor Relations Act.

5. The cause was remanded with directions to redraft the decree to allow the appellants the right by peaceful picketing and persuasion and means not involving violence, intimidation and coercion to advocate the cause of their union and thereby advance their own interests.

6. Paine Lumber Co. v. Neal, 244 U. S. 459 (1917) (union had a by-law to prevent members from working on non-union materials); Stapleton v. Mitchell, 60 F. Supp. 51 (D. C. Kan., 1945); Natl. Fireproofing Co. v. Mason Builders' Assoc., 169 Fed. 259 (C. C. A. 2d, 1909) (depends on whether the purpose is to benefit union or to injure the third person); Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917) (upheld as long as there is no malice, fraud, violence, coercion, intimidation, or defamation); Dominic Maurer, Inc. v. Berks Products Corp., 37 Berks 83, 52 D. & C. 470 (Pa., 1945); *see* Alabama Federation of Labor v. McAdory, 246 Ala. 1, 20, 18 So. (2d) 810, 825 (1944).

7. Stapleton v. Mitchell, 60 F. Supp. 51, 61 (D. C. Kan., 1945). Held unconstitutional, Kan. Sess. Laws 1943, c. 191, § 12, which prohibited any person "to refuse to handle, install, use or work on particular materials or equipment and supplies because not produced, processed, or delivered by members of a labor organization."

8. Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assoc., 274 U. S. 37 (1927) (Held to be restraint of trade. But Brandeis and Holmes, JJ., dissenting, held that the restraint was not unreasonable and that if the union did not have the privilege to refrain from handling the stone, it would be involuntary servitude.); Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921) (Sympathetic strike in aid of a "secondary boycott." But Brandeis, J., dissenting, said, "But other courts with better appreciation of the facts of industry recognized the unity of interest through the union and that, in refusing to work on the materials which threatened it, the union was only refusing to aid in destroying itself." Holmes and Clark, JJ., concurred with the dissent.); A. T. Stearn Lumber Co. v. Howlett, 260 Mass. 45, 157 N. E. 82 (1927); Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997 (1908) (defendant

might inquire then as to what duty appellants violated as to respondent, or, correlatively, what right respondent had that was invaded by appellants. No doubt there was an interference with respondent's right to a free market. But this is not an absolute right at law. No one has the right to be hedged in and protected from the inroads of ordinary business conditions and competition, unless the interference is wanton and malicious.[10] One view is that interference with one's trade relations is presumptively unlawful but that the circumstances may furnish justification for the interference.[11] For justification we must look to appellants' purpose, for in determining the legality of measures taken in these situations the courts inquire as to whether the purpose was primarily to benefit the union or to injure the plaintiff.[12] Here the court found no malice towards the respondent. This is apparent from the exemplary conduct of the appellants. The manner in which respondent was selected as the object of their action indicates that there was no personal feeling against him.[13] Their refusal to unload the truck was probably the very least they could do to protect their interests.[14] But, although they were protecting their lawful interests by lawful means, the court concluded that their actions were conspirative—*if respondent's milk hauling business thereby would have been destroyed.*[15] While the weight of authority holds that such damages are *damnum absque injuria,*[16] this court says it is enough if the

union threatened plaintiff and his customers with strikes and in some instances actually caused them); Purvis v. Local No. 500, 214 Pa. 348, 63 Atl. 585 (1906) (Customers of plaintiff were notified. This notice on the part of 7000 union employees was held to be threatening and coercive rather than persuasive).

9. The court found that there was not a complete absence of threats in that appellants personally notified the haulers that they were going to refuse to unload non-union haulers. But a threat to do something that a person has the privilege to do is not a threat in a legal sense. Smythe Neon Sign Co. v. Local No. 405, 226 Iowa 191, 284 N. W. 126 (1939).

10. Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620 (1888); United Union Brewing Co. v. Beck, 200 Wash. 474, 93 P. (2d) 772 (1939) (a person's business is a property right and is entitled to protection from unlawful interference); *see* Booth & Bro. v. Burgess, 82 N. J. Eq. 181, 65 Atl. 226 (1906).

11. Cohen & Roth v. Bricklayer's Union, 92 Conn. 161, 101 Atl. 659 (1917) (Union had a by-law not to work on non-union materials. Plaintiff was damaged. The union intended to damage him. Held, incidental damage to plaintiff was justified by union's purpose to benefit itself). "It is not easy to define the point beyond which labor in combination can't go. . . . A person in furtherance of his own interests may take such action as the circumstances may require . . . he cannot be charged with actionable wrong, whatever may be the result of his conduct in pursuing his own welfare." Grant Const. Co. v. St. Paul Bldg. Trades Council, 136 Minn. 167, 172, 175, 161 N. W. 520, 522, 523 (1917). ". . . The exercise by one man of his legal right cannot be a legal wrong to another. . . . Whatever one has a legal right to do another can have no right to complain of." 3 COOLEY, LAW OF TORTS (4th ed., 1932) § 532.

12. Parkinson v. Bldg. Trades Council, 154 Cal. 581, 98 P. 1027 (1908) (Union previously adopted a by-law. Purpose was for benefit of the union. The court also stated that economic and political aspects enter into these situations.); Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997 (1908) (here the court held the primary purpose was to injure plaintiff and that the benefit to the union was merely incidental); see also note 11, *supra.*

13. See note 2 *supra.*

14. It was the contention of appellants that there was a disparity between the wages of the rural and union employees which caused bad conditions in the plants and had a tendency to cut down the wages and working conditions that the union had won for its members. Instant case at 58,321.

15. Instant case at 58,324.

16. "The damage to such persons may be serious—it may even extend to their ruin—but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is damnum absque injuria." Natl. Fireproofing Co. v. Mason Builders' Assoc., 169

object of the confederation is to restrain or destroy existing trade—even though the primary purpose was to benefit the union.[17] At any rate, the result is a decree that reflects the court's none too sympathetic attitude towards labor. This is obvious in its comment on the public policy as stated in the Norris-LaGuardia [18] and National Labor Relations Acts.[19] There the public policy was based on the inequality of bargaining power of labor as against corporate and other forms of ownership association. The court makes the statement that, "Now the conditions are reversed. Labor organizations have acquired overpowering strength." [20] That the court should so express itself may well be deemed to be arbitrary. The result is a decision which appears to be a step back from the views expressed by liberal courts under our present labor legislation.

Selective Service—Military Jurisdiction—Effect of Refusal to Take Oath on Validity of Induction Into the Army—Petitioner, who had claimed exemption from the draft as a minister of religion, was ordered to report for induction into the army. When he was requested, along with other selectees, to take the oath of allegiance as a part of the induction ceremony, he intentionally failed to do so. However, this silent refusal went unnoticed by the officer in charge. Petitioner, both before and after the induction process, told army personnel at the induction center that he would not and had not taken the oath. He failed to report to an army headquarters as ordered, was arrested for being absent without leave, and taken to an army camp. Petitioner then brought *habeas corpus* to adjudge the validity of this restraint. *Held,* under the evidence, petitioner did not submit to induction and therefore was not subject to military jurisdiction.[1] *Lawrence v. Yost,* 157 F. (2d) 44 (C. C. A. 9th, 1946).

Here is a post-war analysis of a problem which frequently confronted the federal courts during the war years: when is a draftee actually inducted into the army so as to become subject to military jurisdiction? The difficulty stemmed from the Selective Training and Service Act of 1940 [2] which did not specify when a selectee became in fact a member of the armed forces. In 1944, the Supreme Court, in *Billings v. Truesdell,*[3] decided that induction could not be forced upon a person in order to make him subject to military jurisdiction where he refuses to take the oath, and

Fed. 259, 265 (C. C. A. 2d, 1909). ". . . an action does not lie when two or more persons agree to do a lawful act in a lawful manner and cause damage thereby. . . ." Continental Bank & Trust Co. of N. Y. v. W. A. R. Realty Corp., 265 App. Div. 729, 40 N. Y. S. (2d) 854, 858 (1st Dept. 1943); Shannon v. Gaar, 233 Iowa 38, 6 N. W. (2d) 304 (1942).

17. Instant case at 58,324.

18. 47 STAT. 70 (1932), 29 U. S. C. § 102 (1940).

19. 49 STAT. 449 (1935), 29 U. S. C. § 151 (1940).

20. Instant case at 58,329.

1. The court did not hold that the taking of the oath was a necessary prerequisite to induction, but that the petitioner's passive refusal to accept the oath along with the other evidence did sustain his contention that he had not submitted to induction. The court was particularly influenced by his outspoken frankness before and after the induction procedure.

2. 54 STAT. 894, 50 U. S. C. APP. § 311 (1940). "No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act. . . ."

3. 321 U. S. 542 (1944). Here, when selectee refused to take the oath, he was put under military guard and restrained against his will, and informed that he was in the army. Thereupon he refused to obey an order and was held to await court martial. *Habeas corpus* was brought immediately to challenge the military authority over him.

induction is necessary to complete the procedure of selective service. The Court concluded by saying ". . . a selectee becomes 'actually inducted' within the meaning of Section 11 of the Act when in obedience to the order of his local board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed."[4] At the time of the disputed induction in the instant case, the Army's concept of the procedure was a short patriotic talk followed by an explanation of the obligations and privileges of a soldier, and a refusal to take the oath of allegiance did not alter in any respect the military status of the draftee.[5] All of the war time decisions after the *Billings* case reveal that the courts had little trouble in holding that a manifested voluntary refusal to take the oath did not, in the absence of coercion,[6] render the inductee immune from military law. However, in all but one of these cases, there was the clinching factor of voluntary assumption of military rights and duties following the refusal to take the oath.[7] In addition to the language in the *Billings* case, the subsequent decisions seem to make it perfectly clear that the taking of the oath is not a prerequisite to induction. Furthermore, that in order to successfully resist induction some affirmative refusal to be inducted at the time of the process must be made which is not then followed by an assumption of military activities.[8] The facts of the instant case distinguish it from the precedents in two respects: (1) Yost, instead of openly asserting his objections to induction, was silent and passive at the time of administration of the oath, a factor indicating that he was inducted;[9] (2) Yost's subsequent conduct was not such as to constitute a waiver of any irregularities in the induction ceremony, a factor indicating that he had not submitted to induction.[10] It is not easy, therefore, to discern

4. *Id.* at 559.

5. ARMY REG. Sept. 1, 1942, No. 615-500, ¶ 13.

6. *See In re* Herman, 56 F. Supp. 733 (N. D. Tex. 1944), held not inducted where selectee refused to take oath notwithstanding which he was forced to don a uniform, but he refused to accept military pay and half-heartedly participated in soldier activities.

7. Sanford v. Callan, 148 F. (2d) 376 (C. C. A. 5th, 1945) (passive refusal to take oath following which inductee wore uniform, went to army camp, drilled, and drew pay); Hibbs v. Catovolo, 145 F. (2d) 866 (C. C. A. 5th, 1944) (manifested refusal to take oath followed by a voluntary performance of all military duties for ten months); Mayborn v. Heflebower, 145 F. (2d) 864 (C. C. A. 5th, 1944) (manifested refusal to take oath followed by a willful performance of all duties required of a soldier including the acceptance of benefits of government insurance and an operation in an army hospital); United States v. Mellis, 59 F. Supp. 682 (M. D. N. C., 1945) (manifested refusal to take oath after which selectee applied for insurance and benefits for dependent mother, and did everything like any other soldier for over a month); Miller v. Commanding Officer, 57 F. Supp. 884 (N. D. Tex., 1944) (after a manifested refusal to take oath, selectee served approximately three years in the army, during which, at his request, was given non-combative duty; drew salary, took furloughs, promoted to sergeant).

8. It is important to note in the *Billings* case, *supra* note 3, that the draftee not only refused to take the oath but also refused to do anything else that was required of him, showing beyond a doubt that he had not submitted to induction.

9. The principal case was a 5-2 decision, and the dissenters strenuously argued that the petitioner was required to speak up and refuse to be inducted during the induction process—or he was inducted.

10. In none of the preceding cases, *supra* note 7, did the courts say or indicate for how long a person had to voluntarily assume military rights and duties so that he could be held to have waived his refusal to accept the oath. In those cases this period varied from five weeks to almost three years. *But cf. Ex parte* Kruk, 62 F. Supp. 901 (N. D. Calif., 1945), held selectee was inducted where he openly declined to take the oath, immediately deserted, and was not apprehended until two years later.

enough factual justification in the evidence to sustain the court's contention of non-induction, but rather, this case appears glaringly contra to those which preceded it. The court's conclusion can perhaps be explained, and possibly justified, as a tendency towards leniency, which prefers not to allow the social stigma of a court martial to attach because of one's religious belief now that the war is over.

Torts—Liability without Fault—Limitations on the Rule of Rylands v. Fletcher—Plaintiff, against her wishes, was employed by the Ministry of Supply in defendant's munitions plant and was injured therein when a shell exploded. In an action for damages in which no negligence was averred or proved, *Held,* for defendant.[1] The rule of *Rylands v. Fletcher*[2] is inapplicable without an escape of the damage-causing thing from defendant's land to a place outside his occupation or control. *Read v. J. Lyons & Co., Ltd.,* 62 T. L. R. 646 (H. L., 1946).

This decision is of singular interest not only for the express limitation placed on the doctrine of *Rylands v. Fletcher,* but also for the strong *dictum* that the doctrine does not apply to cases of personal injuries[3] and for the further intimation that it is not an unnatural use of land to manufacture explosives thereon in time of war.[4] At first glance, the holding of the instant case might seem an arbitrary one if the concept of liability without fault is to be recognized at all.[5] But to permit recovery under the rule of *Rylands v. Fletcher* would seem to ignore the fundamental basis of that rule as well as the general policy of past English judicial decision. The general trend of modern tort law has been one of gradual progress away from the concept that one acts at his own peril toward one of imposing liability only where fault exists.[6] The rule of *Rylands v. Fletcher* is only one well recognized example of certain excep-

1. The trial court held that *Rylands v. Fletcher* was applicable, and gave judgment for the plaintiff. Read v. J. Lyons & Co., Ltd., [1944] 2 All Eng. R. 98, 60 T. L. R. 363. This judgment was reversed by the Court of Appeal, [1945] 1 All Eng. R. 106, 61 T. L. R. 148, 33 CALIF. L. REV. 642.

2. Mr. Justice Blackburn in Fletcher v. Rylands, L. R. 1 Ex. 265, 279 (1866), *aff'd.* L. R. 3 H. L. 300 (1868): "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all damage which is the natural consequence of its escape." Lord Cairns, on appeal, added the further requirement that the use to which the defendant is putting his land must be a "non-natural" use. L. R. 3 H. L. 300, 338-339 (1868).

3. Instant case at 648. *But see* Miles v. Forest Rock Granite Co., Ltd., 34 T. L. R. 500, 501 (C. A. 1918); Wing v. London General Omnibus Co., [1909] 2 K. B. 652, 665 (C. A.), 25 T. L. R. 729, 732.

4. Instant case at 649. *But cf.* Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd., [1921] 2 A. C. 465, 471, 37 T. L. R. 973. *Cf.* Rickards v. Lothian, [1913] A. C. 263, 280 (P. C.), 29 T. L. R. 281, 285. See also Bohlen, *The Rule in Rylands v. Fletcher* (1911) 59 U. OF PA. L. REV. 298, 302-303.

5. Plaintiff's counsel contended that, because of the admittedly dangerous nature of defendant's business, it was illogical and unjust to permit a plaintiff to recover if injured just outside defendant's premises, and yet deny recovery if the injury occurred just within those premises. See [1944] 2 All Eng. R. 98, 105, 60 T. L. R. 363, 366.

6. 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW (2d ed. 1937) 447, 458-459; Smith, *Tort and Absolute Liability—Suggested Changes in Classification* (1917) 30 HARV. L. REV. 241, 328, 330; Wigmore, *Responsibility for Tortious Acts; Its History* (1894) 7 HARV. L. REV. 315, 383, 441.

tions to this trend.[7] It finds its foundation in the duty which an occupier of land owes to an occupier of other land in respect to an intrusion from the land of the one to the land of the other.[8] It is not a general rule of absolute liability upon which all other exceptions are based.[9] Since it is a distinct and independent exception to the general trend, it should be confined to its own bounds when relied on for recovery, and its requirements strictly construed.[10] While courts have permitted certain extensions of the rule,[11] in general the trend has been to limit it.[12] Hence, in the instant case, since there was no "escape," the rule is inapplicable.[13] Furthermore, it may be that the House of Lords was influenced by the possible consequences of a contrary holding, namely, the establishment of all firms engaged in hazardous trades as automatic insurers of the safety of their employees, a proposition unknown to the common law.[14] This decision may have little immediate effect upon American courts in view of the confusion surrounding *Rylands v. Fletcher* in this country,[15] and

7. For other exceptions see, *e. g.*, Ellis v. Loftus Iron Co., L. R. 10 C. P. 10, 12 (1874) (trespass by cattle); Besozzi v. Harris, 1 F. & F. 92 (N. P. 1858) (fierce animals); May v. Burdett, 9 Q. B. 101 (1846) (same); Carpenter, *The Doctrine of Green v. General Petroleum Corporation* (1932) 5 So. CALIF. L. REV. 263, 265-266.

8. Instant case at 653. *Cf.* POLLOCK, TORTS (14th ed. 1939) 387, 391-392; Thayer, *Liability without Fault* (1916) 29 HARV. L. REV. 801, 804-805. *But cf.* CHARLESWORTH, NEGLIGENCE (1938) 219.

9. Cattle straying is an instance of strict common law trespass. Ellis v. Loftus Iron Co., L. R. 10 C. P. 10, 12 (1874). Absolute liability for harm inflicted by fierce animals, whether on or off defendant's land, is based on "presumed negligence", and the fact that "an animal is capable of spontaneous action." Aldham v. United Dairies, Ltd., [1940] 1 K. B. 507, 511, 56 T. L. R. 201, 202. *But see* Sycamore v. Ley, 147 L. T. R. 342, 345 (C. A. 1932); Manton v. Brocklebank, [1923] 2 K. B. 212 (C. A.); Filburn v. People's Palace & Aquarium Co., Ltd., 25 Q. B. D. 258, 261 (C. A. 1890); Stallybrass, *Dangerous Things and the Non-Natural User of Land* (1929) 3 CAMB. L. J. 378, 384-385.

10. [*Rylands v. Fletcher*] "is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision." Green v. Chelsea Waterworks Co., 10 T. L. R. 259 (C. A. 1894). Hence there can be no force in the contention that the liability imposed on the facts of the instant case should be analogous to that imposed in the fierce animal cases.

11. Northwestern Utilities, Ltd. v. Guarantee Accident Co., Ltd., [1936] A. C. 108 (P. C.), 52 T. L. R. 93 (where gas escaped from mains under a public road); Charing Cross Electricity Co. v. Hydraulic Power Co., [1914] 3 K. B. 772 (C. A.), 30 T. L. R. 441 (where leakage from defendant's water mains damaged plaintiff's electric cables); West v. Bristol Tramways Co., [1908] 2 K. B. 14 (C. A.), 24 T. L. R. 478 (where creosote from woodblocks, with which defendant paved a public highway, injured plaintiff's land).

12. "There are so many exceptions to it that it is doubtful whether there is much of the rule left. . . ." St. Anne's Will Brewery Co. v. Roberts, 44 T. L. R. 703, 705 (C. A. 1928). See also POLLOCK, *op. cit. supra* note 8, at 390; Thayer, *supra* note 8, at 803.

13. *Accord,* Howard v. Furness Houlder Argentine Lines, Ltd., 41 Com. Cas. 290 (K. B. 1936), [1936] 2 All Eng. R. 781 (where plaintiff was injured by the escape of steam from the boilers of a ship on which he was working). *See* H. & C. Grayson, Ltd. v. Ellerman Line, Ltd., 36 T. L. R. 295 (H. L. 1920); Powell v. Fall, 5 Q. B. D. 59 (C. A. 1880); Ponting v. Noakes, [1894] 2 Q. B. 281, 10 T. L. R. 444; cases cited *supra* note 11. *Contra:* CHARLESWORTH, *op. cit. supra* note 8, at 219.

14. Note (1945) 95 L. J. 176. *See* Bohlen, *supra* note 4, at 303.

15. *Rylands v. Fletcher* is rejected by name in the majority of American jurisdictions. Brown v. Collins, 53 N. H. 442 (1873); Marshall v. Welwood, 38 N. J. L. 339 (1876); Losee v. Buchanan, 51 N. Y. 476 (1873). *Contra:* Wilson v. New Bedford, 108 Mass. 261 (1871); Cohill v. Eastman, 18 Minn. 324 (1872); Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co., 60 Ohio St. 560, 54 N. E. 528 (1899). But the very courts which have so rejected it have repeatedly imposed strict liability for "nuisances" with the rule of *Rylands v. Fletcher* as the true basis of liability. PROSSER, TORTS (1941) 451-452; *cf.* Exner v. Sherman Power Const. Co., 54 F. (2d) 510 (C. C. A. 2d, 1931).

the prevalence of workman's compensation legislation; but it appears clearly in conflict with the *Restatement of Torts*.[16] For better or for worse, then, the effect of this decision in England will be to limit the rule of *Rylands v. Fletcher* to much the same factual situations as that to which it was originally applied by Mr. Justice Blackburn; and it would seem that in the absence of such comparable facts or proof of specific negligence, a plaintiff's only hope for recovery would lie in a successful invocation of *res ipsa loquitur*.[17]

16. RESTATEMENT, TORTS (1938) § 519: ". . . One who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm." *See* Friedman, *Liability for Dangerous Activities Carried Out by Public Order* (1945) 8 MOD. L. REV. 248, 249-250; Note (1945) 95 L. J. 176. It is likely, however, that the same results would have been reached had § 519 been applicable, in view of the exceptions thereto in §§ 521 (a public duty imposed on the actor) and 523 (person harmed knew risk and took part in it).

17. Instant case at 651; Thayer, *supra* note 8, at 806-807.